

STATE OF MICHIGAN
COURT OF APPEALS

DEAN LEE AUKEMAN,

Plaintiff-Appellant,

v

MARY BETH AUKEMAN,

Defendant-Appellee.

UNPUBLISHED

June 12, 2007

No. 267326

Ottawa Circuit Court

LC No. 04-048319-DM

Before: Davis, P.J., and Hoekstra and Donofrio, JJ.

PER CURIAM.

In this property division dispute attendant to the parties' divorce, plaintiff appeals as of right the trial court's December 5, 2005 judgment. Plaintiff claims that the trial court erred by including his premarital assets in the marital estate and by miscalculating the value of the parties' business. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

The parties were married on November 1, 1996, and plaintiff filed for divorce in January 2004. At the time of their marriage, plaintiff worked for Brooks Beverage as a division vice president. In March 1997, plaintiff received a \$75,000 bonus for work he completed in 1996. In January 1998, plaintiff retired from Brooks Beverage, after 20 years of service, to start his own business. After his retirement, plaintiff received an Earned Equity Award Plan (EEAP) award, longevity bonus, severance package, and outplacement services cash-out from Brooks Beverage. Plaintiff subsequently placed the foregoing funds in the parties' joint checking account.

Upon his retirement, plaintiff started a business called Compassion, Inc. The company owns three Save-A-Lot grocery stores, located in Grand Rapids, Cedar Springs, and Walker. At trial, both parties presented experts in business valuation to testify about the value of Compassion, Inc. Eric Adamy, who testified on behalf of plaintiff, determined that the value of Compassion, Inc. was \$1,534,000. John Alfonsi, who testified on behalf of defendant, valued the company at \$3,050,000. The trial court concluded that the value of Compassion, Inc. fell between the experts' assessments and was valued at \$2,225,000.

We review findings of fact made in relation to the division of marital property for clear error. *Sparks v Sparks*, 440 Mich 141, 151; 485 NW2d 893 (1992); *Stoudemire v Stoudemire*, 248 Mich App 325, 336-337; 639 NW2d 274 (2001). A finding is clearly erroneous if, after a review of the entire record, the reviewing court is left with the firm conviction that a mistake has

been made. *McNamara v Horner*, 249 Mich App 177, 182-183; 642 NW2d 385 (2002). The trial court's dispositional ruling is discretionary and will be affirmed unless we are left with the firm conviction that the division was inequitable. *Sands v Sands*, 442 Mich 30, 34; 497 NW2d 493 (1993); *Pickering v Pickering*, 268 Mich App 1, 7; 706 NW2d 835 (2005).

Plaintiff first argues that the trial court clearly erred when it included the entirety of his 1996 bonus, EEAP award, longevity bonus, severance package, and outplacement services cash-out in the marital estate. Plaintiff asserts that because he earned a large portion of these assets before the parties' marriage, he is entitled to credit for contributing the premarital portion of the assets to the marital estate. We disagree.

"Generally, marital assets are subject to division between the parties, but the parties' separate assets may not be invaded." *McNamara, supra* at 183. However, where otherwise-separate property has been commingled with marital property or used for joint purposes, a trial court may include that property in the marital estate. *Polate v Polate*, 331 Mich 652, 654-655; 50 NW2d 190 (1951). The trial court must consider whether the parties intended to make the separate property part of the marital estate. *Id.*

While plaintiff asserts that he did not intend for his Brooks Beverage benefits to be marital assets, his actions indicated otherwise. Plaintiff testified that he placed these assets in the parties' joint checking account, and he admitted that the parties withdrew funds from the account to pay for living expenses, to renovate the marital home, and to finance Compassion, Inc. The parties do not dispute that both their home and Compassion, Inc. are marital assets. Moreover, plaintiff used the benefits to support his family and to start a company that would eventually generate additional support for the family. It is apparent that plaintiff intended these assets to replace the income he would have contributed to the marriage had he retained his position at Brooks Beverage. Because plaintiff commingled his otherwise separate assets with marital assets and used the assets for marital purposes, we find that the trial court did not clearly err in including them in the marital estate.

Plaintiff next argues on appeal that the trial court erred in its valuation of Compassion, Inc. When expert witnesses provide divergent assessments as to the value of marital property, as is the case here, the trial court has great latitude in finding the final value of the property. *Stoudemire, supra* at 338-339. The trial court is in the best position to judge the credibility of the witnesses, *id.* at 339, and it "may, but is not required to, accept either parties' valuation evidence," *Pelton v Pelton*, 167 Mich App 22, 25; 421 NW2d 560 (1988). "[W]here a trial court's valuation of a marital asset is within the range established by the proofs, no clear error is present." *Jansen v Jansen*, 205 Mich App 169, 171; 517 NW2d 275 (1994).

We find no merit to the argument that Alfonsi's assessment of Compassion, Inc. lacked factual support. Both Adamy and Alfonsi were highly credentialed expert witnesses. While Adamy utilized both the income and market approaches to valuation, Alfonsi relied on the income approach and testified that he could not use the market approach in the instant case without relying on inapplicable, "stale" information. Furthermore, Alfonsi based his assessment on the stores' records, probable increases in competition and population, and the company's projected debt load. On the record, there was no reason for the trial court to discredit Alfonsi's calculation.

The crucial difference between the experts' assessments related to their sales projections for the Walker store. Plaintiff testified that the Walker store's weekly sales average was \$58,000 and he predicted future weekly sales of only slightly more than that. Adamy relied on plaintiff's projection. On the other hand, Alfonsi predicted a weekly sales average of \$122,000. Alfonsi based this prediction, in large part, on projections plaintiff created to obtain financing for the Walker store. The trial court determined that both experts based their assessments on speculative projections. Accordingly, the trial court assigned Compassion, Inc. a value between the two assessments. Because the trial court is in the best position to judge witness credibility, and because it arrived at a value within the range established by the evidence, there is no showing of clear error. *Stoudemire, supra* at 339; *Jansen, supra* at 171.

Affirmed.

/s/ Alton T. Davis
/s/ Joel P. Hoekstra
/s/ Pat M. Donofrio